

ARIZONA DEPARTMENT OF EDUCATION

Edward E. Vance, Due Process Hearing Officer
14014 North 8th Place, Phoenix, Arizona 85022
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In the Matter of)	
--- ---- ("Student"),)	IMPARTIAL DUE PROCESS
)	
Petitioner,)	HEARING DECISION AND ORDER
)	
v.	)	Hearing Dates: January 17, 22, 23, & 26, 2002
)	
WASHINGTON ELEMENTARY	)	Held at:
SCHOOL DISTRICT ("District"),	)	(1/17/02) Black Canyon Conference Center
	)	9440 North 25th Avenue
Respondent.	)	Phoenix, Arizona
)	
	)	(1/22, 23 & 26, 2002)
	)	Washington Elementary School
	)	District Office Board Room
	)	8610 North 19th Avenue
	)	Phoenix, Arizona
_____)	

Parent: --- ----

Counsel for District: Sandra Creta, Esq.
Quarles & Brady Streich Lang, LLP
Two N. Central Avenue
Phoenix, Arizona 85004

An index of Student's providers is attached hereto to identify specific personnel providing services to Student. That index is designed to be detached before release of this Decision and Order as a public record.

INDEX OF PROVIDERS

--- ---- v. Washington Elementary School District

Art Teacher	--- ----
Behavior Intervention Specialist	--- ----
Case Manager	--- ----
Counselor (Private)	--- ----
Current Middle School	-----
Current Middle School Teacher	--- ----
Current Student Aide	--- ----
Director of Special Services	Craig Carter, Ed.D.
Fall 2001 Student Aide	--- ----
Former Elementary School	-----
Former Elementary School Teacher	--- ----
Occupational Therapist	--- ----
Occupational Therapist Assistant	--- ----
Parent	--- ----
Principal	--- ----
Private Psychologist	--- ----
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Private Day Placement Teacher	--- ----
School Consulting Psychologist	--- ----
School Counselor	--- ----
School Psychologist	--- ----
Speech and Language Therapist	--- ----

I. INTRODUCTION AND PROCEDURAL HISTORY

Parent filed the request for due process (“Due Process Request”) in this matter on November 21, 2001¹, based on the issues set forth in Parent’s letter to the Arizona Department of Education dated November 26, 2001, as refined in the pre-hearing telephone conferences as described below.

Two pre-hearing telephone conferences were held on December 21, 2001, and December 22, 2001, with Parent, District’s counsel and a representative of District. Confirmation of those pre-hearing telephone conferences, and the procedures governing the hearing process in the due process hearing (“Due Process Hearing” or “Hearing”) were set forth in a letter from the Hearing Officer to the parties dated December 27, 2001 (“Pre-Hearing Confirmation”). During the telephone conferences, it was determined that the Due Process Hearing would take at least two, and possibly three days, and due to scheduling conflicts and the availability of witnesses, District requested an extension of the 45 day time limitation for issuance of the final decision in this due process matter. Parent objected to the extension based on Parent’s desire to have the matter resolved more quickly. The Hearing Officer agreed to extend the time period for conducting the Hearing and issuing a final decision and order until February 5, 2002, for good cause, because: (1) there was a medical necessity for District’s attorney to transfer the case to another attorney, (2) the need for District to make photocopies of Student’s records during the Christmas holidays, and (3) the effect of the Christmas holidays on the availability of key witnesses.

¹ November 21, 2001 was the date of the initial request for due process submitted to the Arizona Department of Education; the initial request was revised and the revised request dated November 26, 2001, was provided to the Hearing Officer.

No pre-hearing motions were filed.² On January 9, 2002, both parties timely disclosed their witness list and exhibits. District did not provide Student's speech records (part of Student's educational records) in time for Parent to disclose those speech records (consisting of one page), but those records were included in District's disclosure.

The Due Process Hearing actually took four full days, and on the last day of the Hearing, both parties requested an extension to allow the Hearing Officer additional time to review the more extensive transcript of the Hearing to prepare this Hearing Decision and Order. The Hearing Officer agreed to extend the time period for issuance of this Hearing Decision and Order until February 18, 2002.

B. Due Process Issues

The due process issues to be determined in this case are set forth in the Due Process Request, as further determined in the Pre-Hearing Confirmation, as follows:

1. Did the District implement the IEP, addenda to the IEP, and due process stipulations with respect to:
 - (a) an aide for Student (including whether an aide was required to be used continuously, and during academics, and how and when teacher decided to use a classroom aide; using aides with same qualifications)?
 - (b) learning strategies of hands-on activities?
 - (c) expectations of Student, mental health and present level of performance?
 - (d) the behavioral component and processing based on mental health issues?
 - (e) the aide processing assignments for student, reviewing foundational skills

² The District had initially indicated that they intended to file a pre-hearing motion as described in the Pre-Hearing Confirmation, but District decided not to file such a motion. Pursuant to the Pre-Hearing Confirmation, Parent was to file and did file a short statement of what relief or solution Parent wanted for each issue. District, on its own initiative, submitted a Proposed Findings of Fact and Conclusions of Law, but that document was not considered by the Hearing Officer because Parent was not represented by legal counsel.

and consequences imposed for Student's behavior?

(f) Occupational Therapy (OT) recommendations?

2. Were the procedures (including parental participation) required under IDEA followed for preparation of IEP addenda, and if not, does such failure constitute a failure to provide a FAPE?
3. Was a phonological assessment/evaluation required to be provided for Student, and was that phonological assessment/evaluation performed?
4. Did the District comply with IDEA requirements for change in placement regarding curriculum standards, "earn out of class", and 7th grade final placement?³
5. Is Student's science class the least restrictive environment for Student?
6. Do the IEP goals and objectives meet Student's academic needs?

C. Evidence Introduced at Due Process Hearing

Testimony and documentary evidence were admitted at the Due Process Hearing. Seventeen (17) witnesses testified at the Hearing. See Transcript of Due Process Hearing, Volumes I-IV ("Tr., I-IV"). One of these witnesses, Parent's witness from Private Day Placement, was not allowed to testify because the witness had no personal knowledge relevant to any issues for the Hearing. Tr. II, 113-128. Additionally, Parent had sought to have School Consulting Psychologist testify but that witness was not available due to serious health problems.

Admission of exhibits submitted in disclosure was discussed during the Due Process Hearing. Tr. III, 236-238. District objected to four pages of handwritten notes

³ As provided in the Pre-hearing Confirmation, Parent submitted a list of proposed remedies for Parent's issues on January 3, 2002; that list modified this issue to also provide "before the due Process stipulation was complete and agreed upon by all parties". This change was not agreed to or brought to the attention of the Hearing Officer prior to the Hearing, and will not be considered herein.

disclosed by Parent on the grounds that those pages were not self-identifying and there was no witness with personal knowledge to identify those exhibits; the exhibits were purportedly prepared by School Consulting Psychologist. Tr. III 237-238. Parent's copy of one document disclosed by both parties was missing pages, and the references herein are only to District's exhibit. Additionally, at the Hearing, one witness, the Director of Special Services, prepared a written document explaining testimony, and there was no objection to having that document added as District Exhibit 59. Thus, Parent exhibits 1 through 25 ("P. Ex.") were admitted into the record (excluding P. Ex. 1, pages 32 through 36). However, Parent Exhibits 7 and 13 are blank, and Parent Exhibit 19 is for speech records included in District's exhibits. District exhibits 1 through 59 ("D Ex.") were admitted into the record. Tr. pp. 236-238.

II. FINDINGS OF FACT

1. For about two years, through January, 2001, Student attended Private Day Placement, a private day placement designed to address behavioral issues. This placement was continued under an Individualized Education Program ("IEP") for Student developed at an IEP meeting dated April 10, 2000, signed by Parent ("Prior IEP"). D. Ex. 18.

2. Student is eligible for special education services under the category emotional disturbance, and has been diagnosed as having bipolar disorder, Attention Deficit Hyperactivity Disorder (ADHD) combined, Oppositional Defiance Disorder (ODD), Pervasive Development Disorder, paranoia, and schizophrenia. D. Exs. 9-10; P. Ex. 11, P1-P5; Testimony of Case Manager, Tr. 11, 134. Student's overall intellectual functioning is in the borderline range. P. Ex. 11, P3-P4. Student also has been identified as having a learning disability. D. Ex. 10.

3. On or about September 22, 2000, Student was evaluated by School Consulting Psychologist, who prepared a Psychological Assessment for Determining Threat and Violence Potential ("Violence Assessment"). The Violence Assessment recommended safeguards and therapeutic strategies to address Student's psychopathology. D. Ex. 12; P. Ex. 1, 29-31.

4. Beginning January 8, 2001, Student transitioned from Private Day Placement to Former Elementary School; beginning February 5, 2001, Student attended Former Elementary School full time in a cross-categorical behavioral ("CCB") self-contained classroom, with a one-on-one aide. D. Ex. 1, at 2; Testimony of Former Elementary School Teacher, Tr. II, 13-14, 89-90, 103.

5. On or about March 2, 2001, Student began attending the regular classroom for art because Student had "earned out" to a mainstream class. See FOF ¶ 29 below; D. Ex. 1.

6. Achievement tests given to Student in February and April, 2001, indicate that Student is performing at the third and fourth grade equivalent levels for reading and math on those tests. Testimony of Former Elementary School Teacher, Tr. II, 66-67; P. Ex. 23, pp. 27 and 28; D Ex. 1.

7. On or about April 5, 2001, when Student was 13 years old, Student's IEP team met to develop a 32 page Individualized Education Program ("IEP") for Student ("Initial 2001 IEP"), which includes, among other things:

- (a) an extensive behavioral assessment and intervention plan;
- (b) a 1:1 Aide/Behavior Coach Daily, M-F, in the classroom, that was needed for Student to make progress in the general curriculum, and to prevent behavioral crises;

- (c) implementation of the Initial 2001 IEP at Former Elementary School through May 2001, and at Current Middle School for the 2001-2002 school year;
- (d) an extensive list of goals and objectives;
- (e) that participation in regular education, extra curricular, and nonacademic activities is earned by demonstrating appropriate behaviors consistent with IEP parameters and proposed classroom behavior structure (but this does not disqualify Student from trying out for after school sports teams);
- (f) Student's attendance for Art in the regular classroom;
- (g) classroom suggestions for occupational therapy; and
- (h) recognition that Student was performing below grade level.

D. Ex. 1; P Ex. 2, 36-67.

8. On or about April 9, 2001, District sent a prior written notice to Parent indicating that District refused to change District's proposed implementation of Student's IEP at Current Middle School as set forth in the Initial 2001 IEP. D. Ex. 1. P Ex. 2, 68.

9. On or about April 25, 2001, an additional IEP meeting was held to discuss Student's transition from Former Elementary School to Current Middle School, as reflected in an IEP Addendum. D. Ex. 2.

10. On or about June 21, 2001, an additional IEP meeting was held to discuss noncompliant behaviors during the first two days of extended school year services, as reflected in an IEP Addendum. D. Ex. 4.

11. On or about July 18, 2001, District and Parent entered into a Stipulation for Due Process Decision ("Settlement Agreement"), to settle a prior request by Parent for due process (involving the Initial 2001 IEP), which the parties intended to incorporate into Student's Initial 2001 IEP. The Settlement Agreement includes, among other things:

- (a) a highly detailed transition plan for Student's transition from Former Elementary School to Current Middle School ("Transition Plan"), and IEP team meetings to evaluate the transition process – if the IEP team perceived that the transition was not successful or that Student was experiencing maturation issues, the transition was to end;
- (b) that District would hire a one-on-one aide for Student who was trained in behavioral intervention and who had experience for Student's educational needs;
- (c) that Student would be considered a seventh grade student during and following the Transition Plan unless returned to Former Elementary School in which case Student would be an ungraded student; and
- (d) Parent's affirmation of unequivocal support for, and the necessity of conveying Parent's unequivocal support for, the Settlement Agreement, including the Transition Plan.

D. Ex. 8.

12. On or about August, 2001, Parent requested that District test Student using the Comprehensive Test of Phonological Processing ("CTOPP"); District agreed to perform the test although there was no indication that the test was needed for Student. Testimony of Speech and Language Therapist, Tr. II, 213-214; Testimony of Director of Special Services, Tr. 1, 38; D. Ex. 10; Tr. III, 214.

13. During the fall semester of 2001, Fall 2001 Student Aide was the one-on-one aide for Student; Fall 2001 Student Aide did not perform satisfactorily as an aide for Student because he was often disruptive, took extensive unauthorized breaks, did not perform all his required tasks, and sometimes acted inappropriately. Although Fall 2001

Student Aide was corrected by teachers and other staff, Fall 2001 Student Aide continued to behave inappropriately, and did not perform required duties, to the detriment of Student; the Fall 2001 Student Aide was discharged in late November, 2001. Testimony of Former Elementary School Teacher, Tr. II, 44-47; Testimony of Current Middle School Teacher, Tr. IV, 104-112; Testimony of School Counselor, Tr. II, 145, 157-158; Testimony of Director of Special Services, Tr. 1, 67-71, 103, 108.

14. On or about September 28, 2001, an additional IEP team meeting was held to discuss Student's progress as it related to the Transition Plan, as reflected in an IEP Addendum. Parent expressed concerns regarding homework, counseling, artwork and academics with which the remainder of the IEP team did not agree. A prior written notice was provided to Parent on or about September 28, 2001, regarding Parent's concerns and indicating that Student's IEP (and the Transition Plan as set forth in the Settlement Agreement) would continue to be implemented. D. Ex. 5.

15. On or about October 26, 2001, an additional IEP team meeting was held to discuss Student's progress as it related to the Transition Plan, as reflected in an IEP Addendum. At that meeting, Parent agreed to accelerate the Transition Plan so that Student would begin full-time attendance at Current Middle School beginning October 29, 2001, to allow Student to participate in wrestling at Current Middle School. D. Exs. 6 & 7; Testimony of Director of Special Services, Tr. 1, 60; Testimony of Behavior Intervention Specialist, Tr. I, 153; Testimony of Current Middle School Teacher, Tr. IV, 65.

16. On or about October 29, 2001, Student began attending Current Middle School full-time. Testimony of Behavior Intervention Specialist, Tr. I, 153; D. Ex. 6. Student was placed in the cross-categorical behavior (CCB) self-contained classroom for all academic subjects, including science. Under the Transition Plan, full time attendance at

Current Middle School had been set to begin on December 10, 2001, but Student would not have attended Prior Elementary School again after November 9, 2001. D. Ex. 8.

17. Sometime in October, 2001, Speech and Language Therapist learned that District had agreed to perform the CTOPP test. Testimony of Speech and Language Therapist, Tr. II, 213-214.

18. On or about November 29, 2001, an additional IEP team meeting was held to discuss Student's progress as it related to the Transition Plan, as reflected in an IEP Addendum. At that meeting, Parent objected to acceleration of the Transition Plan as Parent had previously agreed in the October 26, 2001 IEP team meeting. D. Ex. 7. The Initial 2001 IEP, the Settlement Agreement, and all IEP Addenda thereto, are hereinafter referred to collectively as "Student's IEP".

19. The aide, as required by the Student's IEP, was not provided in Student's regular art class at Current Middle School after the first few weeks because Student was embarrassed to have the aide present there, Student was very good at art and motivated in art class, and Student did not have behavioral problems in art class. Testimony of Art Teacher, Tr. III. See also Testimony of Fall 2001 Student Aide and Current Student Aide, Tr. III; Testimony of Current Middle School Teacher, Tr. IV, 49, 103.

20. District provided all appropriate written IEP team meeting notices to Parent for all scheduled IEP team meetings, commencing with the meeting for development of the Initial 2001 IEP through the November 29, 2001 IEP team meeting ("IEP Meetings"). Parent attended all of those IEP Meetings. See D. Exs. 1, 2, 4, 5, & 6; Testimony of Behavior Intervention Specialist.

21. Parent's extremely active participation in IEP Meetings sometimes limited or restricted the participation of other IEP team meeting participants, but District considered

all comments of Parent made at the IEP Meetings in developing Student's IEP. Testimony of Director of Special Services, Tr. 1, 43, 91-110, Tr. III, 217; Testimony of Behavior Intervention Specialist, Tr. I, 117, 124

22. Parent did not agree with all provisions of Student's IEP, and Parent and District did not reach a consensus about all provisions of Student's IEP. D. Ex. 1; Testimony of Case Manager, Tr. III, at 137.

23. On or about December 17, 2001, Parent signed a Notice to Evaluate for the Comprehensive Test of Phonological Processing (CTOPP"). D. Ex. 34.

24. On or about January 18, 2002, Speech and Language Therapist administered the CTOPP to Student; the final results of that test are anticipated to be completed by February 5, 2002. Testimony of Speech and Language Therapist, Tr. II, 218-223.

25. There are no educational benefits for Student's placement in a regular education classroom for science at this time, and there are concerns about Student's ability to learn in that environment. Testimony of Current Middle School Teacher, Tr. IV, 88-95.

26. Student's IEP was prepared to address Student's individual needs. D. Ex. 10; Testimony of Director of Special Services. Tr. I, 39, 42; Testimony of Current Middle School Teacher, Tr. IV.

27. Student has made progress toward the goals and objectives of Student's IEP. Testimony of Former Elementary School Teacher, Tr. II, 33-34, 69-70; Testimony of Current Middle School Teacher, Tr. IV; Testimony of Director Special Services ,Tr. I, 76-77; D. Ex. 6.

28. Student has diminished academic skills commensurate with his general IQ, and may never achieve grade level. Report of Private Psychologist, P. Ex. 11, P3; Testimony of Current Middle School Teacher, Tr. IV, 234-235.

29. Current Middle School Teacher implements a “Make Your Day” program where students in the CCB classroom can earn classes in a less restrictive environment (“earn-out”) when a student has behaved appropriately for 15 consecutive days; this is part of a basic behavioral management program. D. Ex. 47; Testimony of Current Middle School Teacher, Tr. IV, 17-18; 154-165.

30. Parent objects to the “Make Your Day” program. Testimony of Parent, Tr. IV, 261.

31. Student’s transition to Current Middle School was successful, and Student’s placement at Current Middle School meets Student’s academic, social and behavioral needs. Testimony of Former Elementary School Teacher, Tr. II, 49-50; Testimony of Current Middle School Teacher, Tr. IV, 114; Testimony of Behavior Intervention Specialist, Tr. I, 129, 155-56; D. Ex. 6.

32. Student was provided educational services in conformance with Student’s IEP. Testimony of Former Elementary School Teacher, Tr. II, 105; Testimony of Current Middle School Teacher, Tr. IV, 44-46, 49-60; Testimony of Occupational Therapist; Testimony of Occupational Therapist Assistant. Tr. III.

33. Student is sometimes taught in the classroom using hands-on activities. Testimony of Current Middle School Teacher, Tr. IV, 72-74.

34. Student’s teacher and other staff serving Student use neurolinguistic programming to the extent that they find it useful. Testimony of Current Middle School Teacher, Tr. IV, 218; Testimony of Behavior Intervention Specialist, Tr. I, 199-121.

35. Classroom suggestions for occupational therapy from Student's IEP were only implemented as needed, and were discussed between providers of Student's occupational therapy and Student's classroom teacher. Testimony of Occupational Therapist; Testimony of Occupational Therapist Assistant. Tr. III; Testimony of Current Middle School Teacher, Tr. IV, 54.

36. There was no evidence that District's methodology was inappropriate in any way.

37. Based on observation of, and demeanor of, all the witnesses who testified at the Hearing, the testimony of all witnesses was credible and candid.

III. CONCLUSIONS OF LAW; RATIONALE

A. Burden of Proof.

The Ninth Circuit Court of Appeals has consistently held that the school has the burden of proving compliance with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, et. seq., at the Due Process Hearing. Seattle School District v. B.S., 82 F.3d 1493, 1498 (9th Cir. 1996); Clyde K. Ex rel. Ryan K. v. Puyallup School District, 35 F.3d 1396, 1398 (9th Cir. 1994). Burden of proof is the duty of affirmatively proving a fact in dispute. District has the burden of proving, by a preponderance of the evidence, that District has complied with the requirements of IDEA, and provided a free appropriate public education ("FAPE") to Student.

B. Implementation of Student's IEP

The first issue in this due process determination involves the appropriate implementation of Student's IEP. Free appropriate public education (FAPE) means special education and related services provided at public expense and provided in conformity with the IEP required by IDEA. 20 U.S.C. §1401(8) (emphasis added). See also

Board of Education v. Rowley, 458 U.S. 176 (1982) (citing the FAPE requirements set out in IDEA).

1. Implementation of One-on-One Aide Requirement

District did not provide a one-on-one aide as required by Student's IEP. First, District did not provide a one-on-one aide in Student's regular art class. FOF ¶ 19. Although all the evidence indicated that provision of the aide was not required in art class (1) to progress in the general curriculum, due to Student's extraordinary skills in art; or (2) to prevent behavioral crises due to Student's strong motivation in art, nevertheless, District's failure to provide the aide, without notice to Parent or amendment of Student's IEP, was a failure to implement Student's IEP.

Secondly, District did not provide an appropriate aide while Fall 2001 Student Aide served as Student's one-on-one aide. FOF ¶ 13. District did initially reasonably attempt to deal with the shortcomings of Fall 2001 Student Aide, but for almost three (3) months, this aide did not function appropriately as Student's one-on-one aide. FOF ¶ 13.

While few if any IEPs are perfectly implemented, the issue of whether the failure to provide aide assistance rises to a violation of FAPE will be determined by the facts present here. Although District has some discretion regarding how to utilize the services of a one-on-one aide, District does not have the right to determine that an aide who is to be provided, Monday through Friday, in the classroom, will not be provided during significant amounts of time. There is sufficient evidence in this case that District's failure to implement the aide requirements of Student's IEP constitutes a violation of FAPE.

Parent essentially seeks compensatory education for the inappropriate provision of the one-on-one aide. Compensatory education is not a contractual remedy, but an equitable remedy. In determining whether compensatory education is provided, the

question is not what precise services were missed, but rather, what compensatory services are necessary to provide an appropriate education within the meaning of IDEA. Student W. v. Puyallup School District, 31 F.3d 1489, 1497 (9th Cir. 1994).

There is no need for compensatory services with regard to the lack of an aide in Student's art class; Student received an appropriate education, and there was sufficient evidence that the aide was not actually needed in that classroom. On the other hand, the inadequate aide services provided for more than three months in the fall of 2001 did reduce the effectiveness of Student's education. For that, compensatory education is justified, and fifty (50) hours of one-on-one tutoring services are necessary to compensate and provide an appropriate education to Student.

Parent prevails on this issue.

2. Implementation of Other Provisions of Student's IEP

Parent raised a number of issues regarding how Student's education is presented, for example, the extent of use of hands-on activities, the appropriateness of District's expectations of Student, and the behavioral management program used for Student. District actually uses many of the strategies or aspects of the strategies that Parent wants. FOF ¶¶ 33-34. In other areas, such as the "Make Your Day" program and other behavioral management program issues, District and Parent simply disagree.

District is responsible for providing Student's special education. The determination of the appropriate methodology to be used in teaching a child with special needs is left to the schools and the experts they employ. See Rowley, 458 U.S. at 208; Pitchford ex rel. M. v. Salem-Keizer School District, 155 F.Supp.2d 1213, 1232 (D. Ore. 2001). Parent presented no evidence that District's methodology was inappropriate in any way. FOF ¶ 36.

District presented extensive evidence that it has provided individually designed specialized instruction to Student in compliance with Student's IEP. FOF ¶¶ 26-27 & 32. The fact that Parent thinks such instruction should be presented in a different manner is not a violation of FAPE.

District prevails on this issue.

C. Procedural Compliance in Preparation of IEP Addenda

The second issue in this due process determination is whether District followed the required IDEA procedures for preparation of the IEP Addenda. Failure to follow the procedures set forth in IDEA can result in a denial of FAPE if such failure either (1) results in the loss of educational opportunity, or (2) seriously infringes the parents' opportunity to participate in the IEP formulation process. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479, 1484 (9th Cir.1992).

District provided all notices required by IDEA, and Parent attended all meetings of the IEP team to develop Student's IEP. FOF ¶ 20. Although Parent did not agree with all provisions of Student's IEP, the IEP team did consider Parent's concerns and the information that Parent provided regarding Student in preparing Student's IEP, including the IEP Addenda, as required by law. FOF ¶ 21; See 34 C.F.R. §§ 300.343(c)(iii) and 300.346(a)(1) and (b).

Although the IEP team is to work toward consensus, District has the ultimate responsibility to ensure that Student's IEP includes the services that Student needs in order to receive FAPE. If the team cannot reach consensus, District is required to, and did provide Parent with prior written notice of District's refusal to change the IEP to read as Parent wanted. FOF ¶¶ 8, 14; Appendix A to IDEA regulations, ¶ 9.

There has been no denial of FAPE based on a failure to follow IDEA procedures. District proved that District complied with the procedural requirements of IDEA, and Parent fully participated in the IEP formulation process.

District prevails on this issue.

D. Phonological Assessment or Evaluation

The third issue is whether a phonological assessment is required, and whether it was performed. Parent requested that the CTOPP test be performed, and although there was evidence that the CTOPP was not required for an appropriate evaluation of Student, District agreed to provide this test anyway. Parent consented to the performance of this test, and the applicable test has already been given to Student. FOF ¶¶ 12, 23-24.

Since the test has already been performed, this dispute has been resolved, and there is no longer any determination that this Decision and Order could make that would have a practical effect; thus, this issue is moot.⁴ District will have to comply with any IDEA requirements affected by the results of the CTOPP.

Neither party prevails on this issue.

E. Change of Placement Regarding Seventh Grade Status and Earn Out

Parent's fourth issue is whether District complied with IDEA requirements for change in placement regarding curriculum standards, "earn out of class" and seventh grade final placement.⁵

The Settlement Agreement executed by Parent and District determined that Student would be considered in seventh grade during and after the Transition Plan. FOF

⁴ Since this issue is moot, this Decision and Order will not address whether Arizona regulations requiring that evaluations be performed within 60 days would apply to this test. See A.A.C. § R7-2-401(D). IDEA only requires assessment in areas of suspected disability. 34 C.F.R. § 300.532(g).

⁵ To the extent that Parent is attempting to raise an issue with regard to Student's grade status prior to the Settlement Agreement, that issue has already been determined by the Settlement Agreement that Parent not only executed, but that Parent also affirmed unequivocal support for. FOF ¶ 11.

¶ 11. This seventh grade status would only change to an ungraded status, under the Settlement Agreement, if the transition to Current Middle School was not successful. FOF

¶ 11. The transition to Current Middle School was successful. FOF ¶ 31. Although there was evidence that the Transition Plan was slightly accelerated by mutual agreement of Parent and School, this did not affect Student's grade level status under the Settlement Agreement provisions which are part of Student's IEP. Since this grade status was agreed to by Parent and District under the Settlement Agreement, there are no IDEA placement requirements that are applicable to this grade level determination.

With regard to curriculum standards⁶ and earn-out, Student's IEP includes a provision allowing Student to "earn" less restrictive class placements through a demonstration of appropriate behaviors. There was no evidence that Student has "earned out" any such placements since Student's IEP was put into place. Thus, there was no change of placement under Student's IEP pursuant to the terms of IDEA. If Student does "earn" out a class, District will be required to comply with IDEA's notice requirement that District proposes to change the educational placement of Student. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503 (a).

There is also extensive evidence that Student's current placement is appropriate. FOF ¶ 31; See Gregory K. v. Longview School District, 811 F.2d 1307, 1314 (9th Cir.1987) ("We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide [the child] with educational benefits.").

District prevails on this issue.

⁶ To the extent that the curriculum standards issue was intended to address something other than earn-out, it is addressed in Section G below, under Parent's sixth and final issue.

F. Least Restrictive Environment for Student's Science Class

The fifth issue is whether the placement of Student in the CCB self-contained classroom for science is the least restrictive environment. IDEA and its implementing regulations require that children with disabilities, to the maximum extent appropriate, are educated with children who are nondisabled. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550. In selecting the least restrictive environment (LRE), consideration is to be given to any potential harmful effect on Student or on the quality of services that Student needs. 34 C.F.R. § 300.552(d). The educational benefits of placement in the regular classroom is a key consideration. Sacramento City Unified School District v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).

District provided sufficient evidence that Student would not be benefited, and could be harmed, by placement in a regular classroom for science at this time. FOF ¶ 25.

District prevails on this issue.

G. Appropriateness of IEP Goals and Objectives

The sixth and final issue in this due process is whether the goals and objectives in Student's IEP meet Student's academic needs. In order to provide FAPE to Student, Student's IEP must be "reasonably calculated to enable the child to receive educational benefits." Board of Education v. Rowley, 458 U.S. at 205. To meet this standard, Student must be provided specialized instruction and related services which are individually designed to provide educational benefit to Student. Rowley, 458 U.S. at 203. One determination used in measuring whether a child received educational benefits is whether there is progress toward the central goals and objectives of the IEP. County of San Diego v. California Special Education Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996).

Student's IEP was individually designed for Student, Student was provided educational services addressing the goals and objectives, and Student has made progress toward the goals and objectives of Student's IEP. FOF ¶¶ 26-27 & 32. District has provided FAPE to Student with regard to the goals and objectives of Student's IEP.

District prevails on this issue.

H. Arizona Regulation Findings

The Arizona regulations governing due process standards for special education require that a hearing officer render findings of fact and a decision on specific identified issues. Ariz. Admin. Code § R7-2-405(H)(4). Those specific issues are addressed as follows:

(i) There was no evidence that the evaluation procedures utilized in determining Student's needs have not been appropriate in nature and degree.

(ii) The diagnostic profile of Student on which the placement under the IEP was based is substantially verified. See FOF ¶ 2.

(iii) The evidence presented, and the conclusions of law set forth herein, establish that Student's rights have been fully observed.

(iv) Based on the foregoing, Student's placement has been determined to be appropriate to the needs of Student.

(v) The placement of Student in the special education program is with the written consent of Parent. Parent signed Student's Prior IEP. FOF ¶ 1. No evidence was presented that Parent objected to Student's placement in the special education program.

IV. ORDER

IT IS ORDERED that:

(1) District shall provide fifty (50) hours of one-on-one tutoring services to Student during the summer of 2002 (in addition to any extended school year services that Student otherwise qualifies for) as compensatory education. Such tutoring shall address the academic subjects included in Student's IEP and Student's foundational skills. Such tutoring shall be provided according to a time schedule reasonably convenient to, and which is acceptable to, both District and Parent. Notwithstanding the foregoing, such tutoring services shall be provided in time allotments of not less than one (1) hour, and not more than three (3) hours, per day.

(2) Parent is not entitled to any additional relief.

V. APPEAL

Either party has the right to appeal this Decision to the Office of Administrative Hearings within thirty five (35) calendar days after receipt of this Decision. A.A.C. § R7-2-405(H)(5). Requests for appeal must be submitted in writing to: Dispute Resolution Coordinator, Arizona Department of Education, Exceptional Student Services, 1535 W. Jefferson, Phoenix, Arizona 85007. A.A.C. § R7-2-405(J)(1).

Ordered this ___ day of February, 2002.

By _____
Edward E. Vance
Due Process Hearing Officer

Mailed (via Certified Mail,
Return Receipt Requested) this _____
day of February, 2002, to:

Dr. Craig Carter
Washington Elementary School District
8610 North 19th Avenue
Phoenix, Arizona 85021
CMRR # 7099-3220-0006-0747-1070

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CMRR # 7099-3220-0006-0747-1063

Ms. Theresa A. Schambach
Dispute Resolution Coordinator, Exceptional Student Services
Arizona Department of Education
1535 West Jefferson
Phoenix, Arizona 85007
CMRR # 7099-3220-0006-0747-1087
